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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No._____

A. L. DUTTON, Warden,
Georgia State Prison, Reidsville, Georgia,

Appellant,

v.

ALEX S. EVANS,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

Opinions Below

The opinions of the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Fifth Circuit are at this time unreported. Both are set forth in the Appendix, pp. 1a-16a.

Jurisdiction

This action stems from a petition for a writ of habeas corpus filed by Appellee in the United States District

Court for the Northern District of Georgia under 28 U.S.C. § 2241, alleging *inter alia* that Appellee's State court conviction for murder had been obtained in violation of his "confrontation" rights under the Sixth and Fourteenth Amendments.[1] The crux of Appellee's contention involved the admission of testimony of a co-conspirator's declaration into evidence as a statutory exception to the hearsay rule. The United States District Court held that application of the statute (i.e. Ga. Code Ann. § 38-306) did not violate any of Appellee's constitutional rights and denied his petition. On appeal the United States Court of Appeals for the Fifth Circuit reversed, holding that said statute, as construed and applied by the Supreme Court of Georgia, did conflict with the "confrontation clause" of the Sixth Amendment. It is from this judgment, rendered on September 16, 1968, that Appellant on September 26, 1968 filed his Notice of Appeal in the Court of Appeals for the Fifth Circuit.

The jurisdiction of the Supreme Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. § 1254(2). Cases believed by Appellant to sustain this Court's jurisdiction to review the decision on appeal include *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America*, 355 U.S.

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[1]The same assertion, along with various others, was rejected by the Supreme Court of Georgia in its affirmance of Appellee's conviction, see *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240 (1966), and Appellee's petition for a writ of certiorari, again urging the point, was denied by this Court. *Evans v. Georgia*, 385 U.S. 953 (1966).

489, 492-93 (1958); and *Watson v. Employees Liability Assurance Corp.*, 348 U.S. 66, 69-70 (1954).

Questions Presented

1. Whether the hearsay rule, with all of its subtleties, anomalies and ramifications, is to be read into and equated with the "confrontation clause" of the Sixth Amendment?

2. In the event the hearsay rule is to be construed as a constitutional mandate under the Sixth Amendment, does its application to the States under the Fourteenth Amendment require that the nature and scope of long standing State law exceptions to this heretofore evidentiary rule now be restricted to such exceptions as may be thought by the reviewing Federal court to be desirable under the particular circumstances of the case presented?

3. Did the Court of Appeals err in holding that the State statute providing for a co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of concealing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment?

4. Did the Court of Appeals err in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and "confrontation clause" of the Sixth Amendment?

Statement of the Case

At approximately 1:30 A.M. on April 17, 1964 three police officers of Gwinnett County, Georgia were dispatched to investigate a report of unusual vehicular activity in a rural area of that county. The three officers did not return and around 9:30 A.M. their bodies were found, handcuffed together, in a pine thicket. The bodies bore multiple gunshot wounds, primarily in the back of the head [T. 11-24].[2] Officer Jerry Everett, for whose murder Appellee Evans was subsequently tried and convicted, had received five wounds, with powder burns around those in his head indicating that the fatal shots had been inflicted from a range of only two feet [T. 45-47]. The empty police car in which the three officers had been riding was located in the vicinity as was a burning 1963 maroon or red hardtop Oldsmobile which had been stolen in Atlanta the previous evening [T. 16-26].

After more than a year of intensive investigation Appellee Evans, along with Venson Eugene Williams, was, on August 23, 1965, indicted for the murder of Officer Jerry R. Everett. To the indictment Evans entered a plea of not guilty, elected to be tried separately, and was so tried on October 18-21, 1965.

Evidence adduced during the trial, largely through the testimony of Wade L. Truett (an accomplice),

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[2] "T." references are to page numbers as they appear in the trial transcript which has been certified by the Clerk of the United States Court of Appeals for the Fifth Circuit as an Exhibit to the record in the instant habeas corpus proceeding. References to pages of the record proper, as prepared for transmittal to the Supreme Court of the United States are indicated with the customary "R."

showed the following: Venson Eugene Williams and Truett operated a garage in Hartsville, South Carolina, their business consisting largely of the purchase, repair and sale of wrecked cars. At the time they purchased a badly damaged 1963 model maroon hardtop Oldsmobile in Atlanta, they agreed that the only way in which they could make a profit on the wrecked vehicle would be to steal an identical model and repair the purchased car with parts from the stolen automobile. To assist them in their plan they telephoned Appellee Alex S. Evans, who lived in Gwinnett County, Georgia, relating their need for a 1963 maroon hardtop Oldsmobile [T. 188-193]. Several days later Evans informed Williams and Truett that he had located the required vehicle and they drove to Atlanta, picking Evans up en route. The Oldsmobile was successfully stolen in Atlanta and the three then drove both Williams' car and the stolen car to a rural location of nearby Gwinnett County in order to change license plates and replace the ignition switch on the dash board of the stolen auto [T. 207-209].

While Truett was changing the license plates on the Oldsmobile the police car and three officers dispatched to investigate the report of unusual vehicular activity arrived on the scene. Shortly thereafter Evans managed to remove a gun from the holster of the youngest police officer who had been bending over in the front seat of the stolen car examining the ignition switch. With this pistol in one hand and his own in the other Appellee Evans ordered all three officers to put up their hands. Williams disarmed the officers and Truett manacled them with their own handcuffs. Truett testified that he then drove the police car back off the road and into some woods, and when returning toward the spot

where Evans and Williams had taken the three officers heard what sounded like a "nickel pack of firecrackers" going off. Arriving at the scene he saw the three officers, still handcuffed together, lying on the ground. One officer was making a peculiar sound and Truett testified that he saw Williams bend over and shoot the officer two or three times more while Alex Evans held a flashlight for him. Williams and Evans set fire to the stolen Oldsmobile and with Truett departed in haste [T. 208-222]. Truett's testimony as to the triple murder was corroborated by physical evidence as well as the testimony of various other witnesses, and the jury found Appellee Evans guilty of murder without recommendation of mercy [T. 422-423].

One of the relatively minor bits of evidence introduced by the State during the trial was the testimony of one Lynwood W. Shaw that on the day following Williams' arraignment, in response to Shaw's question as to how he made out, Williams exclaimed:

> "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." [T. 148.]

This testimony was admitted over counsel for Evans' objection that it was hearsay and a denial of his confrontation rights under both the Constitution of the State of Georgia and the Sixth Amendment to the United States Constitution. The trial court held that a *prima facie* showing of a conspiracy had been made and admitted the testimony as the declaration of a co-conspirator, an exception to the hearsay rule under Ga. Code Ann. § 38-306 [T. 141-148]. The witness Shaw was cross-examined thoroughly by counsel for Evans [T. 149-163].

Subsequent to his conviction Evans appealed to the Supreme Court of Georgia, again urging that the testimony complained of was improperly admitted. In affirming, the Georgia Supreme Court, as the trial court, considered the evidence sufficient to establish a *prima facie* case of a car theft conspiracy, with the killing of the police officers having taken place while the conspiracy was being carried out. The court observed that at the time the statement was made Evans and his co-conspirator Williams were still concealing their identity, keeping secret the fact that they had killed the officers and denying their guilt, with the declaration therefore admissible as a statutory exception to the hearsay rule (i.e. under Ga. Code Ann. § 38-306). See *Evans v. State*, 222 Ga. 392, 402, 150 S.E.2d 240, 248, *cert. denied*, 385 U.S. 953 (1966).

Evans then filed his petition for a writ of habeas corpus with the United States District Court, where once again his contention was rejected. See Appendix, pp. 1a-5a. The District Court concluded that the Constitution did not prescribe what kinds of testimonial statements should be given within the courts, this being merely a matter of the law of evidence for the time being, and held that the declaration, admissible under Georgia law, did not violate any constitutional right of Evans.

On appeal, however, the United States Court of Appeals for the Fifth Circuit reversed, holding that Georgia's statutory co-conspirator exception to the hearsay rule, as construed by the Supreme Court of Georgia, was repugnant to the Sixth Amendment [R. 133]. Noting that the Supreme Court of the United States had not yet adequately explained "how and when a state

hearsay rule exceeds permissible constitutional grounds" [R. 128], the Court of Appeals proceeded to fashion a test of its own. Apparently adopting as its starting point the view that all hearsay evidence is *per se* a denial of the right of confrontation, the Court of Appeals declared that existing *State* exceptions to the hearsay rule could henceforth be permitted only where under the circumstances of the particular case involved, there are "salient and cogent reasons" to justify the consequential denial of the defendant's right to be confronted by the witnesses against him [R. 130]. While left unsaid the decision of the Court of Appeals makes it quite clear that the power to make the binding determination as to whether sufficiently "salient and cogent reasons" exist for application of a *State* evidentiary rule in a *State* criminal proceeding, is now to be the *Federal* judiciary, in what must necessarily become routine appellate review and supervision via *habeas corpus* proceedings. The "confrontation clause" of the Sixth Amendment, in other words, has not only been expanded in merely so sweeping a manner as to completely envelop and ossify the hearsay rule into a constitutional mandate, but has indeed been expanded beyond the traditional hearsay rule *coupled with its traditional exceptions,* to the point where even the most widely accepted and settled State law exceptions are to be nullified unless in the eyes of the particular Federal judge or judges reviewing a State conviction, admission of the evidence in question, under the particular circumstances presented, was justified by some "salient and cogent reason."

It goes without saying that the case is one of first impression before the United States Supreme Court.

The Questions Are Substantial

1. Whether the hearsay rule, with all of its subtleties, anomalies and ramifications is to be read into and equated with the "confrontation clause" of the Sixth Amendment?

Until now it has never been supposed that the hearsay rule, along with all of its twists and turns, is a constitutional mandate. The traditional view of the "confrontation clause" of the Sixth Amendment has been that it was designed to prevent an accused from being tried upon *ex parte* affidavits or depositions, and require instead that the witnesses who testify against him do so face to face at the trial where they are subject to cross examination. See e.g., *Dowdell v. United States,* 221 U.S. 325, 330 (1911). Until now it was not thought that this constitutional requirement went so far as to control the nature or scope of oral testimony permitted to be given by a witness who is in court and subject to cross examination.[3] This latter aspect of the introduction of evidence in a criminal proceeding has heretofore been left to that far broader evidentiary rule generically described as the hearsay rule. Thus *Wigmore* states:

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially, – this depends on the law of Evidence for the time being, – but

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[3]As already pointed out, the witness Lynwood W. Shaw, to whose testimony Appellee Evans objected, testified in open court in the presence of the accused and not only was available for but was indeed subjected to a thorough cross-examination. Evans' objection related solely to the scope of Shaw's testimony (i.e. Shaw's being allowed to testify as to his audio as well as visual perceptions).

> only what mode of procedure shall be followed – i.e. a cross-examining procedure – in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 *Wigmore,* Evidence, § 1397 p. 131 (3d ed. 1940).

In *Mattox v. United States,* 156 U.S. 237, 241-42 (1895) this Court similarly indicated that the narrower constitutional standard was not to be equated or confused with the broader evidentiary rule. It was said there of the "confrontation clause" of the Sixth Amendment:

> ". . . that provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of common law."[4]

And more recently, in *Stein v. New York,* 346 U.S. 156, 196 (1953), this Court, in reviewing a State murder conviction, flatly rejected a similar attempt to elevate the hearsay rule to a constitutional requirement, saying:

> "The hearsay-evidence rule, with all of its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."

This is not to stay, of course, that the constitutional standard and broader evidentiary rule may not in some instances overlap, with certain types of hearsay evidence being of such nature as to fall within the more restricted penumbra of the "confrontation clause." In light of the primary purpose of the constitutional standard being one of preventing trial in criminal cases by *ex parte* affidavits or depositions, it is, for example, hardly sur-

[4]See also *Douglas v. Alabama,* 380 U.S. 415, 418-19 (1965).

prising to find that the admission of documentary hearsay may in some situations be violative of the constitutional right of an accused to confront the witnesses against him. See e.g., *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965). Unlike a live witness a piece of paper cannot be cross-examined.

It must be noted, of course, that in the Federal Judiciary it matters little to a criminal defendant whether he obtains a reversal by virtue of a court's exercise of its supervisory power respecting an evidentiary rule (i.e. "hearsay") or through the application of a constitutional mandate (i.e. "confrontation"). Moreover, it is probably accurate to say that the fact that the distinction was academic in the Federal courts prior to 1965 (when *Pointer* first held the "confrontation clause" to be applicable to the States under the Fourteenth Amendment) has caused various Federal decisions to be less precise on the point than they might otherwise have been.

But whatever the lack of clarity may be, Appellant is unaware of any authority supporting the position adopted by the Court of Appeals. In one fell swoop that court has not only radically expanded the penumbra of the "confrontation clause" to cover all forms and types of hearsay, but has indeed decided that the constitutional requirement goes even further, raising serious questions as to the continuing validity of even the most settled State exceptions to the heretofore evidentiary rule. According to the Court of Appeals for the Fifth Circuit all such generally accepted exceptions must now be "continually scrutinized and reevaluated" by the *Federal courts* to see if "salient and cogent reasons" exist in

each given case to justify their application and the consequential deprivation (according to the Court of Appeals) of an accused's right to confront the witnesses against him. It is assumed, of course, that the Court of Appeals did not intend to disturb those hearsay exceptions recognized by the Federal courts respecting Federal criminal proceedings and that these would continue as automatic exceptions to the "confrontation clause." But no such charity is to apply to State criminal proceedings!

Apparently the only point of hesitation by the Court of Appeals in its sweeping revision of the law of evidence of the various States is the fact that this Court, when applying the "confrontation clause" to the States in *Pointer v. Texas,*[5] failed to go so far. Thus the opinion of the Court of Appeals laments the fact that:

> ". . . neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds." [R. 128.]

It might humbly be suggested that perhaps this omission on the part of this Court is due to the fact that it never imagined that *Pointer* and/or subsequent decisions would be construed as having *wholly* overruled *Stein v. New York,* 346 U.S. 156, 196 (1953), causing the hearsay rule, either with or without its traditional exceptions, to be read into and equated with the "confrontation clause" of the Sixth Amendment. Certainly it is safe to say that of all of the rules of evidence which could have been selected for elevation to the dignity of a constitutional mandate it would be exceptionally dif-

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[5]380 U.S. 400 (1965).

ficult to find one less suitable and less deserving than the hearsay rule. This so-called rule, which has so many exceptions as to render its applicability at least as exceptional as the exceptions, has probably been subjected to more criticism than any other evidentiary rule in existence. Many writers have argued for its outright abolition as a senseless anachronism which more frequently impedes than furthers justice. See, e.g., *Hearsay in Administrative Hearings*, 32 Geo. Wash. L. Rev. 689 (April 1964). Obviously this is the trend in civil proceedings. It is now the general rule in administrative hearings, for example, that hearsay *is* admissible. As stated in *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 690 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949), where hearsay evidence not within any of the recognized exceptions was nonetheless admitted over objection:

> "*The common law exclusionary rules of evidence are not based in constitutional interdictions* and are not applicable to administrative proceedings, even of judicial character, in the absence of statutory requirement." (Italics added.)

Inasmuch as the Sixth Amendment is applicable to the States solely through the fundamental fairness notions of the "due process" clause of the Fourteenth Amendment (with the requirement of "due process" applicable to both criminal and civil proceedings) it may appropriately be asked how and why the admission of oral hearsay evidence manages to "shock the conscience" or violate "the very essence of a scheme of ordered liberty"[6] in a criminal proceeding while at the same time

[6]See, e.g., *Rochin v. California*, 342 U.S. 165, 169, 172 (1952); *Bute v. Illinois*, 333 U.S. 640, 659 (1948).

being perfectly proper in a civil action? Is not the function of the rules of evidence in both civil and criminal proceedings to ascertain the truth?

In noting that confusion does exist concerning the extent to which the hearsay rule and right of confrontation overlap, most of the writers seem to agree that the two ought not to be equated. The Constitution is too blunt an instrument to regulate the procedural and evidentiary details of criminal prosecutions. See *Friendly, The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 953-54 (1965). And in expressing reservations concerning certain language of *Pointer v. Texas* it was said in *Confrontation and the Hearsay Rule*, 75 Yale L. J. 1434, 1436 (1966):

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rule of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well."

In concluding discussion of this initial error of the Court of Appeals of expanding the "confrontation clause" so as to cover the hearsay rule in its entirety, it must again be stressed that the present case does not involve hearsay consisting of written testimony taken outside the courtroom. Nor does it involve hearsay respecting any sort of extended opinion evidence. The

witness Shaw, in court and confronting the accused, testified that in response to his question to Williams he received a particular utterance or exclamation. Constitutionally speaking, Appellant finds it difficult to understand why such testimony as to *what he heard* should be any less favorably received than testimony as to *what he saw*. Both are perceptions through sensory organs. We doubt that the courts would be impressed by argument that the "confrontation clause" prohibits a witness from testifying as to the observed physical reaction of an individual to a particular question, e.g., flushed face, scowl, or state of rage. Why should testimony as to observed verbal reaction, particularly where as here it is much in the nature of a spontaneous "ouch," be any less constitutional? We think the "confrontation clause" was never intended to overlap with the hearsay rule respecting testimony of this sort whether or not it was properly admitted under a recognized exception to the rule.

2. **In the event that the hearsay rule is to be construed as a constitutional mandate under the Sixth Amendment, does its application to the States under the Fourteenth Amendment require that the nature and scope of long standing State law exceptions to this heretofore evidentiary rule now be restricted to such exceptions as may be thought by the reviewing Federal court to be desirable under the particular circumstances of the case presented?**

However unfortunate the reading of the hearsay rule into the "confrontation clause" may be in and of itself, the far greater blow to any orderly disposition of criminal cases in State courts lies in the cavalier approach

of the Court of Appeals toward long standing rules of evidence of the various States respecting exceptions to the hearsay rule. Taking a rather expansive view of *Barber v. Page*, 390 U.S. 719 (1968), the Court of Appeals construed that decision as requiring:

> ". . . that the rationale of hearsay exceptions in criminal cases must be continually scrutinized and reevaluated" [R. 129],

and then proceeded to fashion as its test for the constitutionality of State hearsay exceptions, the yardstick of whether or not any exception, under the particular circumstances of the case presented, is to the reviewing Federal court's way of thinking justified by "salient and cogent reasons" [R. 130]. While left unsaid, it must be obvious that this shockingly nebulous standard is in reality nothing less than a transfer from the legislatures and courts of the States to the *Federal* judiciary of the power to make policy judgments as to whether a hearsay exception recognized by *State* law should be allowed in any given *State* criminal proceeding.

The disruptive effect of this sort of Federal "I am King" test upon the trial of criminal cases in State courts is not difficult to foresee. No matter how settled a State's rules of evidence may be regarding the hearsay rule, a State trial judge will rarely if ever be able to know in advance whether or not a United States District Court Judge will conclude during a subsequent habeas corpus review, perhaps some years later, that under the particular circumstances of the case the reasons for admitting the evidence were not sufficiently "salient and cogent." In view of the difficulty, if not impossibility, of recognizing and excluding all hearsay evidence during the heat of trial, it would be difficult to see how any

conviction could ever stand without multiple State court trials and multiple Federal reviews upon habeas corpus "appeals." This Court has already indicated that only a knowing waiver of confrontation rights by an accused will suffice, see *Barber v. Page*, 390 U.S. 719, 725 (1968); *Brookhart v. Janis*, 384 U.S. 1, 4-8 (1966), and if hearsay evidence is a denial of the right to confrontation *per se* as the Court of Appeals concludes, it must be assumed that such hearsay as counsel inadvertently or deliberately fails to object to will (unless such unconstitutionally admitted evidence can be construed to be "harmless error") pollute the entire trial. If it has really come to this, Appellant respectfully submits that in order to save time and money for the Federal and State courts, for counsel, the accused and the taxpaying public, it would be far better to simply have all State criminal violations tried in the Federal courts in the first instance.

If the Court of Appeals is correct in its major premise that "hearsay" and "confrontation" are the same (we still insist they are separate and distinct), it is obvious that some intelligible *objective* standards are desperately needed by State trial courts so as to remove the matter from the quagmire into which it has been dropped and in which it now rests. The Federal "I am King" test, adopted by the Court of Appeals for application to State courts only, clearly fails to furnish such standards.

3. Did the Court of Appeals err in holding that the State statute providing for the co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of conceal-

ing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment?

The unwisdom of attempting to read the hearsay rule into the "confrontation clause" of the Sixth Amendment and even greater unwisdom of attempting to subject well settled State exceptions thereto to the completely amorphous test recommended by the Court of Appeals is well illustrated by the facts and applicable evidentiary law respecting the instant case.

As already pointed out the factual situation is one of a witness testifying in court that when he asked a co-conspirator a particular question he received in reply an exclamation in the nature of an "ouch," which to some slight degree also implicated the accused. In showing that under the generally applicable rules of evidence it was entirely proper to admit such testimony, it may first be noted that it is the rule everywhere that out-of-court declarations of a co-conspirator are ordinarily admissible in the trial of another conspirator. E.g., 22A C.J.S. *Criminal Law* § 754; 31A C.J.S. *Evidence* § 362 (both citations noting that the extent to which the declarations are admissible is to a great extent within the discretion of the trial court). This exception to the hearsay rule has repeatedly been recognized by this Court. E.g., *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116-117 (1948); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917). In Georgia it is provided for by statute. Ga. Code Ann. § 38-306 declares:

> "After the fact of conspiracy shall be proved the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

Concerning the nature of the declaration, the only requirement is one in the nature of relevancy. It must relate to the conspiracy or acts done in furtherance of the conspiracy. As stated in *United States v. E. I. Du Pont de Nemours & Co.*, 107 F.Supp. 324, 325 (D. Del. 1952):

> "A declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization or to other third parties. Du Pont contends, however, the criterion of admissibility of the declaration is 'the making' and the statement can only come in if 'the making' is itself in furtherance of the conspiracy. I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy *or is explanatory of acts done in furtherance of the conspiracy. Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy.*" (Italics added.)[7]

A second generally recognized limitation, and one which is expressly included in the Georgia statute, is that the declaration must be made during the pendency of the conspiracy. Here, however, a divergence of opinion appears. The general rule appears to be that pendency includes both the period of planning prior to the time of the overt act or acts *and the subsequent period where the thrust of the criminal project is to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense.* E.g., *Reed v. People*, 156 Col. 450, 402 P.2d 68, 71 (1965); *Smaldone v. People*, 103

[7] See also *Wiborg v. United States*, 163 U.S. 632, 658 (1896) (noting that the admissibility of such evidence is largely within the discretion of the trial court).

Col. 498, 88 P.2d 103 (23) (1939); *Dailey v. State*, 233 Ala. 384, 171 So. 729, 731 (1937); *State v. Roberts*, 95 Kan. 280, 147 P. 828 (8) (1915); 16 C.J. *Criminal Law* § 1318, pp. 661-62; 22A C.J.S. *Criminal Law* § 770, pp. 1165, 1167. As stated in 2 Wharton, *Criminal Evidence* § 430 (12th ed. 1955):

> "The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment.
>
> . . . .
>
> "The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission: the conspiracy to commit a crime devolves after the commission thereof into a conspiracy to avoid arrest and implication."

Georgia has long followed the general rule, e.g., *Chatterton v. State*, 221 Ga. 424 (5), 144 S.E.2d 726 (8) (1965), *cert. denied*, 384 U.S. 1015 (1966); *Carter v. State*, 106 Ga. 372, 376-77, 32 S.E. 345, 347 (1899); *Byrd v. State*, 68 Ga. 661, 662 (1881), and when Appellee in the instant case urged his objection to the Supreme Court of Georgia, that Court, after first quoting the pertinent statute (i.e. Ga. Code Ann. § 38-306), rejected his assertion, saying:

> "The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered

so much a unit that the declarations of either are admissible against the other."[8]

It is recognized, of course, that the co-conspirator exception has been restricted to a narrower scope in the Federal courts. There the conspiracy is viewed as terminating with the completion of the last overt act in furtherance thereof. E.g., *Grunewald v. United States*, 353 U.S. 391, 399-402 (1957); *Krulewitch v. United States*, 336 U.S. 440, 443-444 (1949); *Fiswick v. United States*, 329 U.S. 211, 217 (1946). But the rule has not heretofore been interpreted as a rule of constitutional dimension. Quite to the contrary, this Court expressly noted in *Krulewitch* that it was dealing simply with an *evidentiary rule* to be applied in the Federal courts and took cognizance of the fact that many States, including Georgia, did adhere to the view that "pending" included the period during which the conspirators sought to conceal the crime. See *Krulewitch v. United States, supra* at 443-44.

Moreover, assuming that the Court of Appeals is not attempting to reverse the previously cited decisions of this Court which do allow the admission into evidence of at least those co-conspirator declarations which clearly are made prior to the time of the last overt act of the conspiracy, it would seem to Appellant to be a strange constitutional doctrine which would cause the admissibility of such out-of-court declarations into evidence to turn on the "time of utterance." Surely this has little if anything to do with the usual "trustworthiness" justification for admitting hearsay evidence as an exception to the rule. When looked at from a view of "trustworthi-

[8] *Evans v. State*, 222 Ga. 392, 402, 150 S.E.2d 240, 248; *cert. denied*, 385 U.S. 953 (1966).

ness," the instant declaration seems to Appellant to stand in a far stronger position than the "dying declaration" exception which this Court recognized in *Mattox v. United States,* 146 U.S. 140, 151 (1892) and *Pointer v. Texas,* 380 U.S. 400, 407 (1965). The present declaration was in the nature of a spontaneous exclamation and a declaration against penal interest. A statement against penal interest is ordinarily not apt to be uttered unless true. See *Newberry v. Commonwealth,* 191 Va. 445, 61 S.E.2d 318, 326 (1950); 31A C.J.S. *Evidence* § 217; *Accord, Opper v. United States,* 348 U.S. 84 (1954).

Finally, it is respectfully submitted that it is of no small importance, particularly in times of mass disorder and group lawlessness, that the States be permitted to retain the broader concept of the co-conspirator exception. One illustration of the salubrious nature of construing the term "pendency" so as to include the period of concealment of the crime is *Bryant v. State,* 65 Ga. App. 523, 16 S.E.2d 241 (1941). There it was shown that members of the Ku Klux Klan, including the defendant on trial, had conspired to flog certain individuals. The Court of Appeals held that one of the victims, appearing as a witness, could properly testify that on the morning after he was flogged (i.e. after the primary object or final overt act of the conspiracy took place) he had been warned by one of defendant's co-conspirators not to say anything about the flogging or he might receive an even worse beating. Such testimony relating to the post overt-act period where there exists agreement or concert of action to conceal the crime can in many cases be of considerable assistance in shedding light on the matter. Since this is the purpose of all evidence Appellant submits there is no valid policy reason

to eliminate this long standing exception to the hearsay rule and that the Court of Appeals erred in holding Georgia's statute, as construed by its Supreme Court, to be unconstitutional.

4. **Did the Court of Appeals err in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and/or "confrontation clause" of the Sixth Amendment?**

It has frequently been held that where the guilt of an accused is established beyond a reasonable doubt by competent evidence, the admission of other evidence which is for some reason incompetent is not prejudicial to an accused and does not constitute ground for reversal, particularly where the improperly admitted evidence is merely corroborative. See *Segurola v. United States*, 275 U.S. 106 (3) (1927); 24B C.J.S. *Criminal Law* § 1915 (5). It is Appellant's contention that even if the Court of Appeals was correct in its view that the Sixth Amendment's "confrontation clause" must now be expanded to cover all hearsay evidence, the testimony here in question was such a minuscule part of the overwhelming mass of evidence of Appellee's guilt as to preclude any possibility that it could even remotely have affected the jury's verdict. A study of the record makes it clear beyond all doubt that Appellee was convicted by the testimony of an accomplice who was an eye witness to the murders, with such testimony being corroborated by an abundance of physical evidence plus the testimony of numerous other witnesses. The somewhat

cryptic but possibly mildly implicating testimony of the witness Shaw to which Appellee objected was entirely corroborative in nature and far less than the proverbial drop in the bucket of the State's evidence.

It is respectfully submitted that under all of the facts and circumstances of this case, reversal on the ground that constitutional error, if any, was "harmless error," would be consistent even under the restrictive view of the doctrine which this Court enunciated in *Chapman v. California,* 386 U.S. 18, 23-24 (1967) and *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963).

CONCLUSION

This case presents substantial questions as to the meaning of the Sixth Amendment's "confrontation clause" and the extent to which the heretofore evidentiary rules of the States respecting hearsay may continue to be utilized in State criminal proceedings. In the absence of reversal or considerable clarification of the nebulous standards which have been adopted by the Court of Appeals for the Fifth Circuit, that Court's decision will at the very least prove to be extraordinarily disruptive to the orderly disposition of criminal proceedings in the State courts for all of the reasons stated. Con-

sideration and resolution of these questions merit plenary briefing and argument before this Court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, ex rel ALEX S. EVANS vs. A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia	CIVIL ACTION NO. 10923

ORDER OF COURT

The petitioner in the above styled case is under a death sentence. The case was transferred to this district under 28 U.S.C., §2241 (d) (1966) which allows a state prisoner seeking a federal habeas corpus to proceed in the district court for the district in which he was sentenced instead of the district in which he is confined. It was originally brought in the Southern District where the petitioner is confined in Reidsville State Penitentiary.

The petitioner was tried for the murder of the Gwinnett County policemen whose bodies were found handcuffed together on the morning of April 17, 1964. The charges against the petitioner were first made public over a year later, on July 1, 1965.

The petitioner Evans was found guilty on October 21, 1966 and was sentenced to death the same day. The appeal to the Supreme Court of Georgia resulted in

affirmance of the trial court, *Evans v. The State*, 222 Ga. 392, and certiorari to the United States Supreme Court was denied on November 14, 1966, 385 U.S., 953.

The district judge for the Southern district where this case was originally filed entered an order staying the execution of Evans on December 14, 1966. The order of transfer to this district specified this last mentioned order would remain in effect.

The State does not take the position in its reply that all state remedies have not been exhausted. It contends, however, that the state court determination on these questions is correct and that no substantial federal question is presented. It is said that a full and adequate hearing was had on all factual questions in the state court proceedings and that the factual determinations made by the state court are fairly supported by the record as a whole. Respondent expressly admits that petitioner's motions relating to his constitutional contentions were made and disposed of during the state court proceedings (see page 3, paragraph 6 of the response). Thus it appears state remedies have been exhausted so as to entitle this Court to assume jurisdiction. See *Brown v. Allen*, 344 U.S. 343 (1953); *Whippler v. Balcom* (5 Cir. 1965) 342 F.2d 388; *Rogers v. Davis* (5 Cir. 1963) 323 F.2d 653.

The petitioner Evans raises the same contentions as the petitioner Williams in Civil Action No. 10924 with one addition which will be discussed below. The Court adheres to its rulings made in the Williams case in regard to pretrial discovery, trial discovery, exclusion of jurors opposed to capital punishment, and the use of testimony from an accomplice who was given immunity.

A careful review of the Evans record shows no abuse of discretion in denial of the motion for a change of venue. The failure to exclude the juror Higgins caused no injury to the petitioner's rights because this juror was later challenged preemptorily by one of the nineteen strikes exercised out of an available twenty.

In addition to the grounds raised by Williams the petitioner Evans also contends he was denied his constitutional right to confront a witness whose testimony was used again him. At the trial a witness on behalf of the state, Lynwood Shaw, testified that he was a fellow inmate at the Atlanta Penitentiary with Evans' co-indictee Williams when the latter was arraigned under the murder charge. He stated that Williams stated to him after his return from court that

> "If it had not been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."

While it may be slightly confused from the record, it appears that petitioner's real contention is the petitioner's right to confrontation and cross-examination pertains to Williams, the co-conspirator who made the above statement. The same complaint was made to the trial judge and before the Georgia Supreme Court which held the evidence admissible, citing Ga. Code Section 38-306 which provides,

> "... after the fact of conspiracy shall be proved, the declarations by one of the conspirators during the pendency of the criminal project shall be admissible against all."

Citing a Georgia case the Supreme Court stated further,

> "The rule is that so long as the conspiracy to con-

> ceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other."

The Court stated,

> "The defendant, and his co-conspirator Williams, at the time this statement was made, was still concealing the identity, keeping secret the fact that they killed the deceased, if they had, and denying their guilt." See *Evans v. The State,* 222 Ga. 392 (6) at page 402.

Among cases cited by petitioner's counsel is the case of *Pointer v. Texas,* 380 U.S. 400, wherein the Court points out the value of the right of confrontation guaranteed under the Sixth Amendment and covered by the Fourteenth Amendment. However, the Court points out exceptions to the necessity of confrontation stating,

> "This Court has recognized the admissibility against an accused of dying declarations and of testimony of a deceased witness who has testified at a former trial. There are other analogous situations which might not fall within the scope of the Constitutional rule requiring confrontation of witnesses." See 13 L.ed. 2nd at page 928.

Professor Wigmore in discussing the right of confrontation and cross-examination refers to such exceptions to the hearsay rule and in connection therewith he points out, "Others might be expected to be developed in the future." He stated "The Constitution does not prescribe what kinds of testimonial statements shall be given infra-judicially, — this depends on the law of Evidence for the time being, — but only what mode of procedure shall be followed." See *Wigmore on Evidence,* Vol. V, page

131. It is well established under Federal law that statements by co-conspirators are admissible against other conspirators if made during pendency of the conspiracy or while it was being concealed. There was other evidence that petitioner Evans was a conspirator. The evidence was admissible under Georgia law and did not violate any Constitutional right of petitioner. In a habeas corpus proceeding by a state prisoner if there is error it must amount to a deprivation of a constitutional right. *Commonwealth of Pennsylvania v. Maroni,* 348 F.2nd 22 and cases cited.

After a careful examination of the entire record in the state court this Court can find no denial of a constitutional right which would entitle the petitioner Evans to a writ of habeas corpus from this Court. The relief prayed for is DENIED and the Clerk is directed to enter a Judgment in accordance herewith.

The stay of execution, heretofore entered, is ordered to continue in effect thirty (30) days from the date of this Order so that counsel may move the appellate court for further relief if they deem such action appropriate.

This the 6th day of September, 1967.

/s/ FRANK A. HOOPER

FRANK A. HOOPER
Senior District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25348

ALEX S. EVANS,

Appellant,

VERSUS

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(September 16, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

GEWIN, Circuit Judge: A year and a half after three police officers were found shot to death in Gwinnett County, Georgia, appellant Evans was tried before a jury and convicted of the murder of one of the officers. Since the jury did not recommend mercy, the Gwinnett County Superior Court sentenced him to die in the

electric chair. Having exhausted his state remedies,[1] Evans filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, alleging that his conviction had been obtained in violation of his sixth and fourteenth amendment rights. The district court denied the petitioned relief and Evans has appealed to this court. We have determined that Evans was denied his sixth and fourteenth amendment right to be confronted by the witnesses against him. We therefore reverse the judgment of the district court.

This case was argued before this court with *Williams v. Dutton*[2] which was the appeal of an alleged coconspirator of Evans. The relevant background facts are set forth in *Williams* and we will not repeat them here. In addition, most of the issues raised are common to both cases. Since we must reverse on the confrontation question, we do not reach Evans' other contentions.[3] However, we should point out that many of the same issues will arise upon the retrial of this case and, in the interest of sound judicial administration, we commend a reference to the treatment in *Williams* of those constitutional questions.

The facts upon which Evans' sixth amendment con-

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[1]The Georgia Supreme Court affirmed Evans' conviction, Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1960), and the United States Supreme Court denied his petition for a writ of certiorari. Evans v. Georgia, 385 U.S. 953 (1966).

[2]___ F.2d ___ (5th Cir. 1968) [No. 25349, August 20, 1968].

[3]The other contentions concern the availability and extent of discovery to a criminal defendant against the state; the qualification of jurors; the admissibility of the testimony of a witness who has been granted immunity from prosecution; and the availability of discovery in a federal habeas corpus proceeding.

tention rests are not in dispute. During Evans' trial a witness, one Shaw, testified that Williams had stated to him that "if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now." According to Shaw, Williams made this statement the day after his arraignment in Gwinnett County on the murder charge and in response to Shaw's inquiry as to how Williams had made out in court. At the time of the alleged statement, both Williams and Shaw were serving sentences for unrelated crimes in the federal penitentiary in Atlanta, Georgia.[4]

Evans' counsel made a timely and vigorous objection to the statement attributed to Williams, arguing that it was inadmissible under both state evidentiary law and the sixth amendment. The trial court overruled counsel's objection, holding the statement admissible in evidence under a Georgia statute which provides:

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[4]Shaw's testimony was somewhat incredible. He testified that Williams was talking to him in a normal voice through a ten-by-ten plate-glass window in a prison hospital door, while Williams was lying on a bed in the room and Shaw was standing in the hall. Shaw had stated in the Williams trial that the window was covered only by wire mesh. The fact that it was covered by a pane of plate glass was brought out in Evans' trial. Moreover, evidence was submitted but rejected by the trial court which tended to show that Shaw's testimony may have been compensation for a respite from the dull routine of prison life.

In spite of its basic incredibility, we are convinced that it cannot be called harmless. *See* Chapman v. California, 386 U.S. 18, 24 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In his dissenting opinion, Justice Quillian of the Georgia Supreme Court stated that Shaw's "testimony . . . obviously was prejudicial to the defendant." Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 251 (1966).

> After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.[5]

The Georgia Supreme Court upheld the ruling of the trial court, stating:

> The defendant [Evans], and his co-conspirator, Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile and the killing of the deceased by the conspirators while carrying out the conspiracy, and the statement by Williams made after the actual commission of the crime, but while the conspiracy continued was admissible.[6]

The confrontation clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In the early case of *Salinger v. United States* the Supreme Court stated:

> The right of confrontation did not originate with the provision in the 6th Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.[7]

Thus the fact that the framers of the Constitution did

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[5]Ga. Code Ann § 38-306 (1954 rev.).

[6]Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 248 (1966).

[7]272 U.S. 542, 548 (1926). *See* Dowdell v. United States, 221 U.S. 325, 330 (1911); Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897); Mattox v. United States, 156 U.S. 237, 243 (1895).

not intend to exclude hearsay evidence appears to have been viewed as having ossified the rule as then developed. This is a regrettably shallow assessment of the wisdom and foresight of those responsible for the destiny of this nation.[8] But this view of the confrontation clause presented no difficulty so long as the clause was applicable only in the federal courts, because the confrontation-hearsay rule was then, for all practical purposes, a single principle in federal criminal cases.[9] History complicated the role of the federal judiciary, however, when the fourteenth amendment was adopted and the federal constitutional standard of due process of law was imposed upon the states. Since many of the rights and privileges embodied in the Bill of Rights had long been regarded as fundamental to any concept of ordered liberty, they were expectably enforced against the states under the due process clause of the fourteenth amendment.[10] The enforcement of the confrontation clause against the states now requires the application of a none-too-concrete

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[8]*See* Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 229 (1955): "No doubt, these provisions of the Constitution were not calculated to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch. Like all legal provisions without a fixed technical meaning, they are ambulant, adaptable to the changes of time. That is their strength. . . ."

[9]See cases cited in note 7 *supra*.

[10]*See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment right against unlawful search and seizure). *See generally* Henkin, *"Selective Incorporation" In the Fourteenth Amendment*, 73 Yale L.J. 74 (1963).

standard to state hearsay rules which have experienced a various and even erratic evolution.[11] Thus the duty of this court is not only to interpret the framers' original concept in light of historical developments,[12] but also to translate into due-process terms the constitutional boundaries of the hearsay rule.[13]

In applying the confrontation clause to the states, the Court in *Pointer v. Texas* stated:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. . . . The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safe-guards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.[14]

However, neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds. In spite of the Court's effusive language, the confrontation clause is certainly not violated merely because the defendant is not permitted to confront and cross-examine a witness against him. The Court has approved the admission,

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[11]McCormick, Evidence § 230 (1954).

[12]*See* Cardozo, The Nature of the Judicial Process 51-97 (1949).

[13]*But see* Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966), in which the writer argues against this approach to the confrontation clause.

[14]380 U.S. 400, 404 (1965).

under a recognized exception to the hearsay rule, of a statement by a witness who is unavailable at the time of trial despite the fact that the right of confrontation is denied.[15] In explaining a previously recognized exception to the right of confrontation, the Court in *Barber v. Page* stated:

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination. . . . This exception has been explained as arising from necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.[16]

Generally but not unexceptionally, some evidence is better than none at all. Thus when rational substitutes for the benefits of confrontation actually exist, there is no reason to exclude hearsay evidence. Although we express no view as to the constitutional validity of any exception to the confrontation requirement which has not been ruled upon, it is important to point out that generally recognized exceptions to the hearsay rule have developed from a painful process of rationalizing the denial of confrontation.[17]

The Supreme Court has now made clear that the rationale of hearsay exceptions in criminal cases must be

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[15]Pointer v. Texas, 380 U.S. 400, 407 (1965). *See* Bruton v. United States, 36 U.S.L.W. 4447, 4449 n.3 (U.S. May 20, 1968). Also see the pre-*Pointer* cases cited in note 7 *supra*.

[16]36 U.S.L.W. at 4330.

[17]*See* 5 Wigmore, Evidence §§ 1420-27 (3d ed. 1940).

continually scrutinized and reevaluated. In *Barber* the trial court had admitted in evidence the transcript of testimony given at a prior trial upon the prosecutor's showing that the witness was outside the state. According to the traditional view, the evidence was admissible because a witness outside the jurisdiction is beyond the compulsory process of the court.[18] The Supreme Court rejected this justification, stating:

> Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law.[19]

We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact.

Appellee in this case states that Evans "demonstrates a rather basic confusion" in contending that his right to confrontation was infringed because witness Shaw did in fact appear in court and testify. However, we think the confusion is appellee's. The testimony objected to was

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[18]*See* McCormick, Evidence § 234, 1954; 5 Wigmore, Evidence § 1404 (3d ed. 1940).

[19]36 U.S.L.W. at 4330. The Court held that, unless the prosecutor has made a good-faith effort to secure the witness' presence at the trial and failed, the witness cannot be regarded as unavailable.

not Shaw's but that attributed by Shaw to Williams who was not in court and who did not testify. Appellee further argues that the Supreme Court authority cited by Evans involved *written* evidence and that those cases, therefore, do not control the *oral* statement involved here. Since appellee has shown no basis for justifying a different treatment of written and oral evidence, we reject the distinction as untenable.

We have searched in vain for a reason to justify the abridgment of the right to confrontation which obviously occurred in this case. Appellee merely points to Georgia's co-conspirator statute which, rather spinx-like, answers all but the questions we ask. The admission in evidence of the statement attributed to Williams occurred in circumstances which offered no rational substitute for confrontation.[20] In *Douglas v. Alabama*[21] the state called as a witness against the defendant one Loyd, who had already been convicted on the same charge. When Loyd refused to answer questions, the prosecutor proceeded to read a confession, allegedly made by Loyd, which incriminated the defendant. As he read, the prosecutor would pause occasionally and ask Loyd if he had made the statement read, but Loyd refused to answer any questions. The Supreme Court held that the prosecutor's ventriloquistic performance had violated the defendant's sixth amendment right to confrontation. A substantially

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[20]Appellee has argued in his brief that the trend in the law today is to reject the hearsay rule "as a senseless anachronism." Whatever may be the trend of the law of evidence in civil and administrative proceedings, the trend of the criminal law is subject to a different set of circumstances, not the least of which is the sixth amendment.

[21]380 U.S. 415 (1965).

similar attempt was made in this case to put words into the mouth of Williams who would doubtless have spit them out if he had testified.[22]

In support of the constitutional validity of the Georgia statute under which Williams' alleged statement was admitted, appellee argues that the statute is identical in principle to rules in both federal and state courts. Since the denial of confrontation in the present case is without rational justification, we need not consider the implications of a general judicial acceptance of such a rule. However, we should point out that the statute involved here, as interpreted by the Georgia Supreme Court, goes far beyond the traditional coconspirator exception to the hearsay rule.[23] The crime had been committed well over a year before the statement was allegedly made. Moreover, all three of the alleged conspirators were at that time in prison serving sentences for other crimes. With all due respect to Georgia's highest tribunal, it is inconceivable that the statement attributed to Williams was made "during the pendency of the criminal project."[24]

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[22]Since Williams pleaded not guilty and subsequently appealed his conviction, it is almost certain that he would have denied making the statement even if he had agreed to testify.

[23]*See, e.g.*, Fiswick v. United States, 329 U.S. 211, 216-17 (1946); 4 Wigmore, Evidence § 1079 (3d ed. 1940); Annot., 4 A.L.R.3d 684 (1965); 16 Am.Jur.2d *Conspiracy* § 40 (1964).

[24]The Georgia Supreme Court conceded that Williams' alleged statement was "made after the actual commission of the crime." Evans v. State, 222 Ga. 392, 397, 150 S.E.2d 240, 248 (1966). Additionally, contrary to the state court's finding that the coconspirators were still concealing their identity, the appellee in his brief to this court admits that the statement attributed to Williams was "a statement which implicated Evans." In Fiswick v. United States, 329 U.S. 211, 217 (1946), the Supreme Court

The authorities relied upon by appellee[25] make clear that the recognized exception relates only to statements actually made while the criminal conspiracy remained alive.[26]

As construed by the Supreme Court of Georgia, the statutory coconspirator exception to the hearsay rule authorizes practices repugnant to the sixth amendment under the facts and in the circumstances presented in this case. As applied in this case, the statute collides with Evans' sixth amendment right of confrontation. Since appellant Evans' right to confront the witnesses against him was infringed, it is clear that he is entitled to a new trial within a reasonable time. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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stated: "[C]onfession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

[25]Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116-17 (1948); United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); 31A C.J.S. *Evidence* § 362 (1964). Also see authorities cited in note 23 *supra*.

[26]We think it indicative of the evidentiary quality of the statement attributed to Williams that it would not, under generally recognized rules of evidence, have been admissible even if Williams had testified. We know of no rule of evidence which would permit a witness to testify to an incriminating extrajudicial statement made by him sometime in the past.